INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	10
Conclusion	17

CITATIONS

Cases:

Associated General Contractors or Massachusetts v. *Altshuler*, 490 F. 2d 9 certiorari denied, 416 U.S. 957	15
Board of Education v. *Swann*, 402 U.S. 43	13
Carter v. *Gallagher*, 452 F. 2d 315, certiorari denied, 406 U.S. 950	14
Castro v. *Beecher*, 365 F. Supp. 655	13
Comstock v. *Group of Institutional Investors*, 335 U.S. 211	11
Contractors Association of Eastern Pennsylvania v. *Shults*, 442 F. 2d 159 certiorari denied, 404 U.S. 854	14
Edelman v. *Jordan*, 415 U.S. 651	15, 16
Erie Human Relations Commission v. *Tullio*, 493 F. 2d 371	14
Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70	15, 16
Griggs v. *Duke Power Co.*, 401 U.S. 424	11, 12
Louisiana v. *United States*, 380 U.S. 145	13
Morrow v. *Crisler*, 491 F. 2d 1053 certiorari denied, October 21, 1974, No. 73-1838	14
Northeast Construction Co. v. *Romney*, 485 F. 2d 752	14
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205	15
United States v. *IBEW, Local 38*, 428 F. 2d 144, certiorari denied, 400 U.S. 943	15

571-389—75——1

Cases—Continued

	Page
United States v. *United Bro. of Carpenters, local 169*, 457 F. 2d 210, certiorari denied, 409 U.S. 851	14
United States v. *Local 212, IBEW*, 472 F. 2d 634	14
United States v. *Ironworkers Local 86*, 443 F. 2d 544, certiorari denied, 404 U.S. 984	14
United States v. *Georgia Power Co.*, 474 F. 2d 906	12
Vulcan Society of New York v. *Civil Service Commission of New York*, 490 F. 2d 387	14
Constitution, statute, regulations and rule:	
United States Constitution, Eleventh Amendment	10, 11, 16
Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*:	
42 U.S.C. 2000e	2
42 U.S.C. 2000e–2(h)	13
42 U.S.C. 2000–2(j)	9
42 U.S.C. 3601	15
Guidelines on Employee Selection Procedures:	
29 C.F.R. 1607	8
29 C.F.R. 1607.3	9, 12
29 C.F.R. 1607.4(a)	12
29 C.FR. 1607.5(b)	12
29 C.F.R. 1607.5(b)(5)	9
29 C.F.R. 1607.5(c)(1)	8, 12
29 C.F.R. 1607.9	12
Feb. R. App. P. 39(a)	10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS, PETITIONERS

v.

BOSTSON CHAPTER, N.A.A.C.P., INC., AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 21–41 and 42–45) are reported at 504 F. 2d 1017. The opinion of the district court (Pet. App. 46–74) is reported at 371 F. Supp. 507.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1974. The petition for a writ of certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the written examination used by petitioners as a selection device for the employment of firefighters had a disproportionate adverse impact on black and Spanish-surnamed persons, was not shown by petitioners to be job-related, and was therefore unlawful.

2. Whether a court, having found unlawful discrimination in employment on the basis of race and national origin, may properly order that qualified members of the affected classes be hired on an accelerated basis to overcome the present effects of that past discrimination.

3. Whether the Eleventh Amendment prohibits the taxing of costs of appeal against a state official.

STATEMENT

1. On January 24, 1973, the Attorney General brought an action on behalf of the United States under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, alleging that the City of Boston, the Commissioner of the Boston Fire Department, and the Massachusetts Division of Civil Service and its five Commissioners and Director engaged in a pattern or practice of discrimination against black and Spanish-surnamed persons with respect to their employment as firefighters in the Boston Fire Department. The complaint alleged that the defendants' recruiting practices, testing procedures, and other entrance requirements for firefighters tended to deprive black and Spanish-surnamed per-

sons of equal employment opportunities. It sought an injunction against the continuation of the alleged discriminatory practices and other relief designed to overcome the present effects of the past discrimination.

The action was consolidated with a previously filed class action brought by the Boston Chapter of NAACP and by black and Spanish-surnamed persons, who made similar allegations of discriminatory practices with respect to the employment of firefighters by all the cities and towns subject to the Massachusetts civil service law.

After a hearing on plaintiffs' motions for a preliminary injunction—which the parties agreed to treat as a final hearing on the merits with respect to the testing issue—the district court found (1) that "plaintiffs have established a prima facie case that the Fire Fighter Entrance Examination (FFEE) has a discriminatory effect on blacks and Spanish-surnamed persons" (Pet. App. 56), (2) that "defendants have not met their burden of demonstrating that the exam is 'in fact substantially related to job performance' " (*id.* at 63), and (3) that the Boston Fire Department's recruitment "policy has in effect resulted in the exclusion of minorities from the fire department" (*id.* at 67). It accordingly enjoined the defendants "from engaging in any act or practice which has the purpose or effect of discriminating against any applicant or potential applicant for employment with the Boston Fire Department or any other fire department in the Commonwealth subject to Civil Service law" (*id.* at 70).

To eliminate the effects of the past discriminatory practices, the court fashioned a comprehensive plan for the accelerated employment of qualified black and Spanish-surnamed persons (*id.* at 72–74), to be applied by the Division of Civil Service in certifying eligible applicants for employment by the fire departments of "all cities and towns subject to Civil Service law which have a minority population of 1% or more" (*id.* at 73). The plan requires the creation of priority employment groups composed of qualified black and Spanish-surnamed applicants, and it directs that applicants from those groups be certified for employment as firefighters on a 50 percent or 25 percent basis (*id.* at 72–73).[1] The plan is to remain in effect until a city or town "achieves a complement of minorities [in the fire department] commensurate with the percentage of minorities within the community" (*id.*

[1] Group A consists of all black and Spanish-surnamed applicants who failed any earlier test but who pass a valid new test and are otherwise qualified. Group B consists of all persons on petitioners' current eligibility list. Group C consists of all black and Spanish-surnamed persons who pass a valid new test and are otherwise qualified for appointment but who did not fail any earlier test. Group D consists of all other persons who pass a valid new test and are otherwise qualified. (Pet. App. 72–73.)

For the cities of Boston and Springfield, candidates are to be certified on an alternating basis from minority lists (Groups A and C) and the other lists (Groups B and D). For all other cities and towns with minority populations of at least one percent, one candidate must be certified from Group A for each candidate from Group B until Group A is exhausted; thereafter, one candidate must be certified from Group C for every three candidates from the other lists (Groups B and D). (*Id.* at 73, 75.)

at 73–74). Thereafter, certifications for employment by the fire department for that town or city may be made in any non-discriminatory manner consistent with Massachusetts law (*id.* at 74).[2]

2. The court of appeals affirmed in all respects (*id.* at 21–41).[3]

(a) The court held that 1970 census figures showing widespread and substantial underemployment of black and Spanish-surnamed persons as firefighters,[4] taken together with a small testing sample showing that black and Spanish-surnamed applicants performed less well on the firefighter's entrance examination than did others,[5] and uncontroverted expert testi-

[2] The district court also preliminarily enjoined the City of Boston from requesting certifications of eligible applicants for permanent employment in the fire department unless it actively recruits black and Spanish-surnamed applicants for job vacancies (Pet. App. 71–72).

[3] The City of Boston and the Commissioner of the Boston Fire Department did not appeal (Pet. App. 23). The petitioners herein were the only appellants.

[4] Boston's black population was 16 percent and its Spanish-surnamed population was three percent; less than one percent of the city's firefighters were blacks and 0.1 percent were Spanish-surnamed. Springfield's population was 12 percent black and 3.4 percent Spanish-surnamed; 0.2 percent of its firefighters were black, and it had no Spanish-surnamed firefighters. Other cities also showed substantial disparities. (Pet. App. 24–25, n. 4.)

[5] Partial statistics from the August 1971 examination showed that 39 percent of the applicants who identified themselves as black or of Spanish origin passed the test while 56 percent of the applicants who identified themselves as "Caucasian" passed the test (Pet. App. 24, n. 3, 55). The court of appeals stated that "[u]ntil recently relatively few minority members applied for fire fighting jobs, resulting in a very small sample from

mony to the effect that "black and Spanish surnamed candidates typically perform more poorly on paper-and-pencil tests of this type" (*id.* at 27), supported the district court's finding that the plaintiffs made out a *prima facie* case that the test had a disproportionate adverse impact on black and Spanish-surnamed candidates. "[I]t can be argued," the court of appeals stated, "that a showing of significant disproportionality in minority employment, coupled with even minimal proof of a higher minority failure rate, is enough to shift to the Division of Civil Service the burden of justification" (*id.* at 26).[6] But the court did not rest its decision on that ground alone. It was the expert testimony that "conclusively tip[ped] the scale in plaintiffs' favor" (*ibid.*). "In light of the expert testimony, we cannot say that the district court was clearly erroneous in its ultimate fact finding that plaintiffs had established a *prima facie* case" (*id.* at 27).

(b) The court of appeals also upheld the district court's finding that the defendants had failed "to show a substantial relationship between the test re-

---

which to draw conclusions about their comparative test performance" (*id.* at 25). "[W]here, as here, the minority sample is disproportionately low, it is both dangerous to rely too heavily on the figures and unfair to ignore them entirely" (*id.* at 26, n. 6).

[6] "When widespread minority underemployment is shown to exist in a given occupation, primary selection devices should not be immunized from study by placing an unrealistically high threshold burden upon those with least access to relevant data. This seems especially so where the small size of the sample may be traceable to the test's discouraging effect as well as to unequal recruitment practices" (Pet. App. 26).

sults and job performance" (*id.* at 28). The firefighter's entrance examination has two parts: 25 questions "covering current events, spelling, vocabulary and arithmetic," and 75 questions "taken verbatim from the 'Red Book,' a fire fighter's preliminary manual available from state officials" (*id.* at 29). The court of appeals stated that "[t]he 'passing' score of 70 was selected arbitrarily, without reference to the expected or actual distribution of scores" (*id.* at 30); that "[t]he civil service examiner who wrote the latest versions [of the test] was without professional training in employment or psychological testing, and did not consult with anyone who had such training" (*ibid.*); that "[t]he general questions in the first part of the test have nothing to do with fire fighting, and plaintiffs' expert was of the opinion that they were not useful even as an index of general intelligence" (*id.* at 30–31); and that the second-part questions, though they deal with firefighting concepts, put "a premium on ability to memorize terms that, at the time [when the test is administered], contain only abstract meaning" (*id.* at 31). "[T]here is a difference," the court stated, "between memorizing * * * fire fighting terminology and being a good fire fighter" (*ibid.*).

Petitioners argued, however, that their test validation study adequately demonstrated that it is substantially job-related. The validation study rated firefighters on the basis of both "objective" and "subjective" measures of job performance. The study found that test scores were not significantly correlated with any

of the 12 subjective measures, separately or in combination, or with the overall objective measure. It did show a barely significant correlation between test scores and two of the 13 separate tasks that composed the objective measure.

The court of appeals quoted and approved (*id.* at 33) the district court's finding that these two "minimally significant" correlations did "not constitute 'convincing' evidence of job-relatedness" (*id.* at 63). The court of appeals stated that the Equal Employment Opportunity Commission's *Guidelines on Employee Selection Procedures*, 29 C.F.R. 1607, which establish minimum standards for test validation, "are not satisfied by just any correlation to any facet of job performance" (Pet. App. 34). They provide that "the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance" (29 C.F.R. 1607.5 (c)(1)). The court of appeals stated that "[t]he test here, and the validation study performed by defendants' expert, do not survive close scrutiny" (Pet. App. 34).

The court of appeals identified several defects in the validation study. Since the subjects of the study had all passed the test, "there is no evidence that those failing would be less capable as fire fighters than those passing" (*id.* at 34–35); "a correlation within the range of 70 to 100 can easily be produced by data that would indicate no significance in differences in the 50 to 70 range" (*id.* at 35). In addition, "the sample for the study would seem biased," because "those with

higher scores also had additional experience on the job" (*id.* at 36) and because some persons who passed the test but who might have been poor firefighters "may have been filtered from the sample by the time of the study because of voluntary resignations, release for unsuitability in training or on the job, failure of the physical, etc." (*ibid.*). Finally, "the defendants never attempted to demonstrate that alternatives to the test are unavailable" (*id.* at 35) and made "no effort * * * to include minorities in the sample of the study" (*id.* at 36), both of which are required by the EEOC *Guidelines* (29 C.F.R. 1607.3, 1607.5(b)(5)). "There are, in sum, too many problems with the test for us to approve it here" (Pet. App. 37).

(c) The court of appeals also rejected petitioners' constitutional and statutory challenges to the relief fashioned by the district court. The court of appeals held that "a program of color conscious relief" is a constitutionally permissible "means of ameliorating the continuing effects of past discrimination" (*ibid.*) and that the relief ordered by the district court "goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities" (*id.* at 38–39).

The court also rejected petitioners' contention that Section 703(j) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–2(j),[7] "withdraws from the

[7] Section 703(j) states that "[n]othing contained in [Title VII of the Act] shall be interpreted to require any employer * * * to grant preferential treatment to any individual * * * because of the race, color, religion, sex, or national origin of such individual * * * on account of an imbalance which may

district court the power to grant color-conscious relief when the discrimination is unintentional" (Pet. App. 40). The court held that "relief undertaken in order to redress past discrimination, whether or not intentional, is permitted" and that "Section 703(j) deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer" (*ibid.*).

(d) The court of appeals subsequently taxed against petitioners, pursuant to Fed. R. App. P. 39(a), the private plaintiffs' costs on appeal, a total of $49.50. In a supplemental opinion, the court held that an award of costs against state officials is not barred by the Eleventh Amendment (Pet. App. 42–45). The "allocation of costs," it stated, "is an incident to the court's jurisdiction and judgment in the main action" (*id.* at 44).

ARGUMENT

The decision of the court of appeals applies settled principles in a manner consistent with the decisions of this Court and the other courts of appeals. Further review is not warranted.

1. Both the district court and the court of appeals found that the firefighter's entrance examination disproportionately screened out black and Spanish-

---

exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer * * *, in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

surnamed applicants and that petitioners had failed to demonstrate that the test was a valid predictor of successful job performance. Applying this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, both courts below held the test unlawful under Title VII of the Civil Rights Act of 1964.

a. Petitioners' primary challenge is to the finding of both courts that the entrance examination had a disproportionate adverse impact on black and Spanish-surnamed applicants (Pet. 10–14). But that finding is amply supported by the record, which shows not only a substantial disparity between minority representation in the firefighter work force and minority representation in the pool of available candidates (Pet. App. 24–25, n. 4), but also a higher failure rate by black and Spanish-origin applicants who took the entrance exam in August 1971 (*id.* at 24, n. 3). There was also uncontroverted testimony from expert psychological witnesses on both sides of the case that written tests of the kind used by petitioners tend disproportionately to exclude black and Spanish-surnamed candidates (*id.* at 26–27). "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error" (*Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214). Petitioners have made no such showing in this case.

b. This Court has ruled that the EEOC *Guidelines on Employee Selection Procedures* represent the administrative interpretation of Title VII by the enforcing agency and are accordingly "entitled to great

deference" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434). All the parties in the courts below took the position that those *Guidelines* should be the point of reference for determining whether the validation study submitted by petitioners was adequate to demonstrate the job-relatedness of the firefighter test.

Both the district court and the court of appeals applied the *Guidelines* to the validation study and properly concluded that petitioners did not meet the burden of showing that the examination "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" (*Griggs, supra,* 401 U.S. at 431). The court of appeals found that a minimally significant correlation between test scores and only two of 25 job performance measures did not survive the close scrutiny required by the *Guidelines* (Pet. App. 34) (see 29 C.F.R. 1607.5(c)(1)); that the cutoff score was arbitrarily selected (*id.* at 30) (see 29 C.F.R. 1607.9); that the defendants made no effort to demonstrate that alternatives to the test were available (*id.* at 35) (29 C.F.R. 1607.3); and that no minorities were included in the validity study (*id.* at 36) (see 29 C.F.R. 1607.4(a), 1607.5(b); see also *United States* v. *Georgia Power Co.,* 474 F. 2d 906 (C.A. 5)).

Petitioners' assertion (Pet. 14–15) that the courts below adopted a "stricter" standard than that set forth in the *Guidelines* is not supported by the language or reasoning of the decisions below. On the contrary, both courts repeatedly cited and relied upon the *Guidelines* as a basis for their holding that job-

relatedness had not been shown (see Pet. App. 37, 57–58, 62–63).[8]

2. Once racially discriminatory practices have been found, courts of equity have not only the responsibility to prevent future discrimination, but also the duty to correct, insofar as feasible, the effects of past unlawful practices. *Louisiana* v. *United States*, 380 U.S. 145, 154. Race consciousness in formulating relief is necessary to effectuate both objectives (see, *e.g.*, *Board of Education* v. *Swann*, 402 U.S. 43, 46), and a numerical remedy is an appropriate mechanism for doing so.[9]

---

[8] On December 16, 1974, this Court granted the petition for a writ of certiorari in *Albemarle Paper Company* v. *Moody*, No. 74–389. The petitioners in that case contend, among other things, that the court of appeals erred in holding that petitioners' validation study of their pre-employment examination failed to include analyses required by the EEOC *Guidelines*. They argue (Pet. 12–14) that rigid compliance with the *Guidelines* would nullify the congressional recognition (see 42 U.S.C. 2000e–2(h)) of the utility of non-discriminatory examinations. In the instant case, however, petitioners do not challenge the *Guidelines;* they contend, rather, that their validation study was conducted in accordance with the *Guidelines* and that the courts below imposed a stricter standard of test validation than that established by the *Guidelines*. Petitioners here, unlike the petitioners in *Albemarle Paper*, concede that the "EEOC guidelines are entitled to great deference and should be followed by the courts" (Pet. 15). Thus, the question presented in *Albemarle Paper* is not presented here, and the Court need not defer disposition of the present petition pending the decision in that case.

[9] In the district court, the United States sought numerical hiring goals rather than separate certification lists. Instead, the district court patterned relief upon that agreed to by the Massachusetts Commissioners and Director of Civil Service with regard to police departments in a consent decree in *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass.). See Pet. App. 37.

Following these principles, the court of appeals approved priority poolings of qualified black and Spanish-surnamed applicants, to be certified for employment on a 50 percent basis for Boston and Springfield and on a 25 percent basis for other cities, until the percentage of minorities in the fire department is commensurate with the percentage in the community. Given a finding of racial discrimination in employment, affirmative hiring relief of some sort, with numerical objectives, is both appropriate and constitutional. As petitioners apparently acknowledge (Pet. 18), such relief has uniformly been sustained by the courts of appeals.[10] Indeed, the failure of a district court to order such affirmative relief after a finding of racially discriminatory employment practices has been held to be an abuse of discretion. *Morrow* v. *Crisler, supra* note 10.

When courts grant such affirmative relief to overcome the effects of past discrimination, they do not, as petitioners contend (Pet. 18–19), violate the anti-

[10] See *Castro* v. *Beecher*, 459 F. 2d 725 (C.A. 1); *Vulcan Society of New York* v. *Civil Service Commission of New York*, 490 F. 2d 387 (C.A. 2); *Erie Human Relations Commission* v. *Tullio*, 493 F. 2d 371 (C.A. 3); *Contractors Association of Eastern Pennsylvania* v. *Shultz*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Morrow* v. *Crisler*, 491 F. 2d 1053 (C.A. 5) (*en banc*), certiorari denied, October 21, 1974, No. 73–1838; *United States* v. *Local 212, IBEW*, 472 F. 2d 634 (C.A. 6); *United States* v. *United Bro. of Carpenters, Local 169*, 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *Carter* v. *Gallagher*, 452 F. 2d 315, 327 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (C.A. 9), certiorari denied, 404 U.S. 984; *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752 (C.A. D.C.).

preference provisions of Section 703(j). As the court of appeals correctly stated, that Section "deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer" (Pet. App. 40). See *Associated General Contractors of Massachusetts* v. *Altshuler*, 490 F. 2d 9 (C.A. 1), certiorari denied, 416 U.S. 957; *United States* v. *IBEW, Local 38*, 428 F. 2d 144 (C.A. 6), certiorari denied, 400 U.S. 943; *Contractors Association of Eastern Pennsylvania* v. *Shultz, supra* note 10.

3. Petitioners contend (Pet. 19–20), relying on this Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, that the Eleventh Amendment bars an award of costs on appeal against a state official.[11] The contention is answered by the decision in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70, in which this Court held unanimously that costs may be awarded against a State as a litigant in the Supreme Court. The power to award costs is "within the inherent authority of the Court in the orderly administration of justice as between all parties litigant, properly within its jurisdiction" (275 U.S. at 74–75). The rule should be no different with respect to the federal district courts and courts of appeals.

[11] While the United States was not, of course, directly affected by the award of costs to the private plaintiffs here at issue, we have an interest in this question because the efficacy of private efforts under Title VII and other analogous statutes (*e.g.*, 42 U.S.C. 3601, *et seq.*—fair housing) affects the government's enforcement efforts. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211.

In *Edelman,* the Court held that the Eleventh Amendment prohibited a federal court from ordering a state official to make retroactive payments of certain statutory benefits found to have been wrongfully withheld. Unlike the grant of retroactive benefits in *Edelman,* however, an award of court costs is not the equivalent of an "award of damages against the State" and is not "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" (415 U.S. at 668). Though the award of costs in the present case will have an impact on the state treasury, that impact is ancillary to the disposition of the case on the merits. So long as the principal relief is prospective in nature, an incidental award of court costs against a state official is a permissible consequence of the litigation itself and does not offend the Eleventh Amendment.[12]

[12] Although, as petitioners point out (Pet. 19), two courts of appeals have held that the Eleventh Amendment bars an award of attorneys' fees against a state official, that issue is not presented here. The court of appeals did not award attorneys' fees in this case, and the district court deferred consideration of the private plaintiffs' request for such an award (Pet. App. 76). The Court need not consider here, therefore, whether *Fairmont Creamery* or *Edelman* controls with respect to attorneys' fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
DAVID L. ROSE,
WALTER W. BARNETT,
JAMES M. FALLON,
JUDITH E. WOLF,
Attorneys.

MARCH 1975.

U.S. GOVERNMENT PRINTING OFFICE : 1975